THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AARON WILLIAMS, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

PILLPACK LLC,

Defendant.

NO. 3:19-cv-05282-RBL

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO STAY

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TABLE OF CONTENTS

Page No.

I. INTRODUCTION 1

II. BACKGROUND 2

A. This case is primarily about PillPack's use of prerecorded voice calls to generate sales 2

B. Much of the costly discovery in the matter was done before Plaintiff filed his motion for class certification 3

III. ARGUMENT AND AUTHORITY 4

A. A stay would not promote efficiency because both of Plaintiff's claims will move forward regardless of how the Supreme Court rules in the *Facebook* case 4

B. Plaintiff will be prejudiced if PillPack's untimely request for a stay is granted 7

C. Ordinary costs of litigation do not establish hardship or inequity to PillPack 8

IV. CONCLUSION 9

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TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

A.M. ex rel. Deora v. Bridgecrest Acceptance Corp.,
No. 4:20-cv-00553-SEP, 2020 WL 3489280 (E.D. Mo. June 26, 2020) 5, 6

Ali v. Trump,
241 F. Supp. 3d 1147 (W.D. Wash. 2017) 8

Aquilar v. Ocwen Loan Serv. LLC,
289 F. Supp. 3d 1000 (D. Minn. 2018) 6

Clinton v. Jones,
520 U.S. 681 (1997) 4

Dependable Highway Express, Inc. v. Navigators Ins. Co.,
498 F.3d 1059 (9th Cir. 2007) 4

Doherty v. Comenity Capital Bank,
No. 16-cv-01321-H-BGS, 2017 WL 11421531 (S.D. Cal. Jul. 11, 2017) 5, 6

Edwards v. Oportun, Inc.,
193 F. Supp. 3d 1096 (N.D. Cal. 2016) 7

Facebook Inc. v. Duguid,
Pet. for Writ of Cert., No. 19-511, 2019 WL 5390116 (U.S. filed Oct. 17, 2019) 5

Holcombe v. Credit Prot. Ass'n, LP,
44 F. Supp. 3d 1311 (M.D. Ga. 2014) 5

Johnson v. Comodo Grp., Inc.,
No. 16-4469 (SDW) (LDW), 2020 WL 525898 (D.N.J. Jan. 31, 2020) 5

Landis v. N. Am. Co.,
299 U.S. 248 (1936) 4, 7

Lathrop v. Uber Techs., Inc.,
No. 14-CV-05678-JST, 2016 WL 97511 (N.D. Cal. Jan. 8, 2016) 7

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Lockyer v. Mirant Corp.,
398 F.3d 1098 (9th Cir. 2005) 4, 8

Mendez v. Optio Sols., LLC,
239 F. Supp. 3d 1229 (S.D. Cal. 2017) 6

O'Hanlon v. 24 Hour Fitness USA, Inc.,
No. 15-cv-01821-BLF, 2016 WL 815357 (N.D. Cal. Mar. 2, 2016) 7

Ontiveros v. Zamora,
No. CIV. S-08-567 LKK, 2013 WL 1785891 (E.D. Cal. Apr. 25, 2013) 7

Sliwa v. Bright House Networks, LLC,
No. 2:16-cv-235-FtM-29MRM, 2016 WL 3901378 (M.D. Fla. Jul. 19, 2016) 6

Steiner v. Brookdale Senior Living, Inc.,
383 F. Supp. 3d 949 (N.D. Cal. 2019) 6

Volkswagen Grp. of Am., Inc. v. Saul Chevrolet, Inc.,
No. 515-cv-00505-ODW (SPX), 2015 WL 5680317 (C.D. Cal. Sept. 25, 2015) 7

FEDERAL STATUTES

47 U.S.C. 227(a)(1) 5

47 U.S.C. § 227(b)(1)(A) 1, 5

47 U.S.C. § 227(c)(5) 1, 6

FEDERAL RULES

47 C.F.R. § 64.1200(c)(2) 1, 6

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I. INTRODUCTION

PillPack waited to seek a stay until *three weeks after* the Supreme Court granted certiorari in a case where the question presented is not dispositive of any claim in this case. PillPack's motion for a stay pending the Supreme Court's resolution of *Facebook, Inc. v. Duguid* should be denied because the decision will not dispose of either of the two claims in this case. It should also be denied because PillPack waited until a week after Plaintiff filed his motion for class certification and the day after PillPack took Plaintiff's deposition to seek a stay. If PillPack is concerned about preserving resources, why did it wait so long to seek a stay?

PillPack's representation to the Court that if the Supreme Court "rules in Facebook's favor, some of Plaintiff's claims against PillPack will be subject to dismissal" (at 2), is false. The question presented in *Facebook* concerns the definition of an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act. Plaintiff has two claims in this case. One is that PillPack called his cell phone using an ATDS *or an artificial or prerecorded voice* and without his consent. 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiff's primary theory on this claim is that the calls were placed using an artificial or prerecorded voice. *See, e.g.*, Dkt. #29 at 1 ("The central and determinative issues in this case will be (1) whether the avatar technology used to place the calls is an artificial or prerecorded voice"); *id.* 20 (section of class certification brief arguing that whether the calls used a prerecorded voice is a common question that predominates). If Plaintiff prevails on this theory, it will not matter whether the calls were also placed using an ATDS.

Plaintiff's second claim is that his cellphone number was listed on the national do-not-call registry when PillPack's agents called him without his consent. Use of an ATDS is not an element of this claim. 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2). There is no way it could be impacted by the Supreme Court's ruling in *Facebook*. PillPack's suggestion that the decision

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in *Facebook* will determine whether Plaintiff's "claims" can survive summary judgment (Dkt. #40 at 8) is simply wrong.

II. BACKGROUND

A. This case is primarily about PillPack's use of prerecorded voice calls to generate sales.

Plaintiff Aaron Williams filed this lawsuit after he received two prerecorded voice calls promoting PillPack's "multipacking" pharmacy service. Dkt. #33 at ¶¶ 7-8. Plaintiff's central contention is that the calls Prospects DM placed on PillPack's behalf were made using an avatar that delivered a script using a prerecorded message. It is not true that Plaintiff claims only "some" of the calls were made using this prerecorded voice technology. *See* Dkt. #40 at 7 n.2. According to PillPack, Plaintiff's expert Jeffrey Hansen opined that the more than 900,000 calls to cell phones placed using the ViciDial system did not involve a prerecorded voice. *Id.* This is false. Mr. Hansen explained that the ViciDial system can use soundboard technology to deliver prerecorded messages. Dkt. #30-10 at ¶ 36. Mr. Hansen opined that soundboard technology plays a "series of prerecorded message[s]," that the ViciDial system can use soundboard technology (as shown in Exhibit AL to his report), and that PillPack's vendors used this functionality. *Id.*; *see also* Chandler Decl., Ex. 1.

This is not just Mr. Hansen's opinion. Joshua Grant, the President of Prospects DM—the company that operated the dialer and placed the calls—testified that the calls for the PillPack campaign were made using a prerecorded voice:

Dkt. #37-17 at ¶ 8.

A consultant who helped set up the PillPack campaign testified that by design, "the calls placed in this campaign would be placed using a prerecorded voice system which is

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sometimes described in the telemarketing industry as an Avatar or an IVR (interactive voice response) system." Dkt. #34 at ¶ 7; Chandler Decl. Ex. 2 (Anderson Dep. at 46:8-16).

The testimony of PillPack's employees and documents it produced in discovery confirm that the calling campaign delivered pre-recorded messages. PillPack's Rule 30(b)(6) designee testified that he understands that the campaign used "voice recordings that were managed by an agent that – to deliver a script." Dkt. #30-9 (Swindle Dep. at 71:10-12). PillPack designated the campaign an "IVR" campaign because there was "voice technology used" to make the calls. *Id.* at 148:8-10. An employee who managed the campaign described it as follows: "there would be a call that would be made out and they would have a prerecorded voice, prerecorded person, who would basically introduce whatever, introduce the service." Dkt. #30-23 at 90:21-24.

Mark Dorf, the president of Performance Media, exchanged emails with PillPack employees about the Avatar system used to make the calls. Dkt. #30-21, Dkt. #37-22. And Mr. Dorf supplied PillPack's VP of customer acquisition with 8 call records, all of which are plainly the same prerecorded voice and which Mr. Dorf characterized as "exactly as ordered" by PillPack. Dkt. #30-26.

B. Much of the costly discovery in the matter was done before Plaintiff filed his motion for class certification.

This case has been on file for over a year. Dkt. #1. Much of the costly discovery in this matter is complete. PillPack has already produced thousands of documents and Plaintiff has produced hundreds. Chandler Decl. ¶ 3. Plaintiff has obtained documents and data from third parties through subpoenas, and is continuing to pursue data and other information about the calls from third parties. *Id.* ¶ 5. Plaintiff has deposed four PillPack employees, both parties have deposed third party Christina Anderson, and PillPack has deposed Plaintiff. *Id.* ¶ 6. Both parties have produced their expert reports and PillPack has deposed both of Plaintiff's experts. *Id.* ¶ 7.

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The parties are addressing discovery issues, in particular, PillPack has represented to Plaintiff that it is in the process of gathering the call data and do-not-call list stored in its own dialing system that it has yet to produce in this matter. *Id.* ¶ 4.

Plaintiff has already filed his motion for class certification (Dkt. #29), and PillPack's response is due on August 21 (Dkt. #27).

III. ARGUMENT AND AUTHORITY

This Court has the inherent power to issue a stay pending resolution of a separate matter. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). But a *Landis* stay should be granted only "in rare circumstances." *Id.* at 255. The party seeking a stay "bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). The party seeking a stay must "make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay" will damage the opposing party. *Landis*, 299 U.S. at 255; *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007).

Courts must balance the competing interests that a grant or refusal of the stay will affect. Among those competing interests are (a) "the possible damage which may result from the granting of a stay"; (b) "the hardship or inequity which a party may suffer in being required to go forward"; and (c) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

A. A stay would not promote efficiency because both of Plaintiff's claims will move forward regardless of how the Supreme Court rules in the *Facebook* case.

Regardless of what the Supreme Court rules in the *Facebook* case about the definition of an ATDS, it will not be dispositive here. Whether PillPack's agents used an ATDS is not an element of Plaintiff's claim for national do-not-call registry violations and even if the dialing system Prospects DM used to place the calls does not qualify as an ATDS, the parties will still have to litigate whether they were made using a prerecorded or artificial voice to resolve

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Plaintiff's claim based on calls to cell phones. Based on the question presented, the *Facebook* decision will provide no guidance on the central issues of whether the calls used a prerecorded voice and whether PillPack is vicariously liable for the calls.

The TCPA defines an automatic telephone dialing system ("ATDS") as equipment which has the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers." 47 U.S.C. 227(a)(1). The Supreme Court granted certiorari in *Facebook*, to address whether this definition "encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator.'" *Facebook Inc. v. Duguid*, Pet. for Writ of Cert., No. 19-511, 2019 WL 5390116, at *ii (U.S. filed Oct. 17, 2019) (Question 2).

Plaintiff alleges PillPack's agents called him and other class members using both an ATDS and an artificial or prerecorded voice. Thus, no matter how an ATDS is defined, the use of an artificial or prerecorded voice gives rise to a separately actionable violation under the TCPA, which prohibits certain robocalls "using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. 227(b)(1)(A) (emphasis added). In addition to being clear from the plain language of the statute, it is well established that a plaintiff "can state a claim under the TCPA by alleging the use of (1) an 'artificial or prerecorded voice' *or* (2) an ATDS." *Doherty v. Comenity Capital Bank*, No. 16-cv-01321-H-BGS, 2017 WL 11421531, at *2 (S.D. Cal. Jul. 11, 2017) (emphasis added); *see also Holcombe v. Credit Prot. Ass'n, LP*, 44 F. Supp. 3d 1311, 1316 (M.D. Ga. 2014) ("From the plain text of the statute, each of these violations is independently actionable"); *Johnson v. Comodo Grp., Inc.*, No. 16-4469 (SDW) (LDW), 2020 WL 525898, at *8 (D.N.J. Jan. 31, 2020) (prerecorded message calls violate TCPA whether the calls were answered or went to voicemail).

Courts have rejected requests for a stay pending decisions on the ATDS definition when the plaintiff alleged receiving artificial or prerecorded voice calls. *See, e.g.*, *A.M. ex rel. Deora v. Bridgecrest Acceptance Corp.*, No. 4:20-cv-00553-SEP, 2020 WL 3489280, at *3 (E.D.

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Mo. June 26, 2020) (denying motion to stay pending Supreme Court's decision on petition for certiorari in *Facebook* where plaintiff claimed some calls made using a prerecorded voice); *Mendez v. Optio Sols., LLC*, 239 F. Supp. 3d 1229, 1234 (S.D. Cal. 2017) (denying stay because "Plaintiff's TCPA claims are not limited to Defendant's use of an ATDS, but also concern Defendant's use of an artificial or prerecorded voice"); *Aquilar v. Ocwen Loan Serv. LLC*, 289 F. Supp. 3d 1000, 1009 (D. Minn. 2018) (denying stay pending *ACA International* decision because it would not address prerecorded voice calls); *Doherty*, 2017 WL 11421531, at *2 ("Thus, regardless of how the D.C. Circuit rules in *ACA* on the ATDS issue, Plaintiffs could proceed with their TCPA claims based on their allegations that Defendants used 'an artificial or prerecorded voice.'"); *Sliwa v. Bright House Networks, LLC*, No. 2:16-cv-235-FtM-29MRM, 2016 WL 3901378, at *4 (M.D. Fla. Jul. 19, 2016) (denying stay because "the appeal will not affect Plaintiff's contention that [defendant] called him using a prerecorded or automated voice"); *see also Jiminez v. Credit One Bank*, No. 19-4236 *et al.*, Dkt. 97 (2d Cir. July 22, 2020) (denying motion to stay appeal pending Supreme Court's decision in *Facebook*); *Steiner v. Brookdale Senior Living, Inc.*, 383 F. Supp. 3d 949, 955 (N.D. Cal. 2019) (rejecting stay pending appeal of arbitration ruling because discovery and class certification briefing would proceed even if some claims subject to arbitration). Plaintiff alleges he received unlawful prerecorded voice calls and has already put before the Court voluminous evidence that Prospects DM placed all calls for PillPack using prerecorded voice technology.

In addition, Plaintiff's claim based on national do-not-call registry violations does not require him to prove that the calls were placed using either an ATDS or prerecorded or artificial voice. 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2). The nature of claims in this case distinguish PillPack's authority. *See, e.g., Hoffman v. Jelly Belly Candy Co.*, No. 2:19-cv-01935-JAM, Dkt. #20 (E.D. Cal. June 26, 2020) (granting stay pending Supreme Court rulings in case where plaintiff received text but no claims involved use of a prerecorded voice or do-not-call registry violations).

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B. Plaintiff will be prejudiced if PillPack's untimely request for a stay is granted.

Plaintiffs in civil cases have "an interest in having their case resolved quickly." *Volkswagen Grp. of Am., Inc. v. Saul Chevrolet, Inc.*, No. 515-cv-00505-ODW (SPX), 2015 WL 5680317, at *4 (C.D. Cal. Sept. 25, 2015). "[U]nduly delaying a plaintiff's day in court constitutes a significant injury." *Ontiveros v. Zamora*, No. CIV. S-08-567 LKK, 2013 WL 1785891, at *5 (E.D. Cal. Apr. 25, 2013). In class actions, "the possible damage and prejudice to Plaintiff that may result from staying the case" is significant because a stay "would suspend for an indefinite period of time Plaintiff's opportunity—and the opportunity of the putative class—to vindicate their rights before [the] court." *O'Hanlon v. 24 Hour Fitness USA, Inc.*, No. 15-cv-01821-BLF, 2016 WL 815357, at *5 (N.D. Cal. Mar. 2, 2016).

The Supreme Court has already extended the time for the parties to file briefs in *Facebook*.[1] While PillPack claims that given its customary practices, the Court will decide *Facebook* during the October 2020 Term and issue a decision in late 2020, the Supreme Court has already pushed a dozen cases from the 2019 Term to the 2020 Term,[2] and the pandemic also may decrease the Court's ability to hear and decide a full slate of cases. If PillPack's requested stay is granted it may very well extend into next July.

The indefinite length of PillPack's requested stay presents a fair possibility of harm to Plaintiff. *Edwards v. Oportun, Inc.*, 193 F. Supp. 3d 1096, 1101 (N.D. Cal. 2016) ("[T]he Court concludes that there is a 'fair possibility of harm' to Plaintiff because the length of the stay is an indefinite one."); *Lathrop v. Uber Techs., Inc.*, No. 14-CV-05678-JST, 2016 WL 97511, at *4 (N.D. Cal. Jan. 8, 2016) (denying stay because "oral argument has not been scheduled" and neither the parties nor the court "can forecast" when a decision will ultimately issue); *see also Landis*, 299 U.S. at 257 ("The stay is immoderate and hence unlawful unless so framed in its

[1] The docket for *Duguid v. Facebook, Inc.*, No. 19-511, is available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-511.html.

[2] *See* https://www.supremecourt.gov/announcements/COVID-19_Guidance_April_17.pdf

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inception that its force will be spent within reasonable limits."); *Ali v. Trump*, 241 F. Supp. 3d 1147, 1152–54 (W.D. Wash. 2017) (staying ruling on single motion—not entire case—where appellate ruling was expected to be issued quickly).

PillPack's requested stay may last a year or more. And because PillPack decided to wait until after Plaintiff filed his motion for class certification and after PillPack deposed Plaintiff, PillPack's counsel can use as much of the delay as it likes to craft a response to Plaintiff's already filed motion. It can do so secure in the knowledge that the work will not go to waste because the case will proceed regardless of what the Supreme Court rules in *Facebook*. The question of whether the dialers used to place calls on PillPack's behalf are autodialers within the meaning of the TCPA is a paradigmatic merits issue amenable to a class-wide resolution in any case, so there is no reason to delay the Court's decision on the threshold question of class certification until after the *Facebook* ruling.

Finally, Plaintiff is continuing to pursue data and other information about the calls from third parties. If a stay is entered as to those third parties, their documents, or their data may disappear before it is lifted. At a minimum, Plaintiff requests that any stay permit him to complete third party discovery already initiated and require PillPack to complete the supplemental productions it has already agreed to make.

C. Ordinary costs of litigation do not establish hardship or inequity to PillPack.

"Being required to defend a suit, without more, does not constitute a clear case of hardship or inequity within the meaning of *Landis*." *Lockyer*, 938 F.3d at 1112. Yet the cost of continuing to defend the suit is the only hardship PillPack has identified (at 10-11). This asserted hardship rings particularly hollow given that PillPack is owned by Amazon.com, one of the nation's richest companies. PillPack fails to articulate how its arguments concerning vicarious liability might depend on any particular definition of an ATDS, and thus a stay would only delay, not obviate PillPack's need to move for summary judgment if it plans to challenge its vicarious liability for the unlawful calls here, *see* Dkt. #40 at 2:18-20. In addition, pressing

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pause in the midst of the data and document collection and review that PillPack has said it is already doing will likely increase costs. Stopping a document review midstream only to pick it up over a year later is highly inefficient.

PillPack's bizarre suggestion that the resources Plaintiff will expend to continue prosecuting the case should be factored into the hardship PillPack will face absent a stay (*id.* at 10:25-26), should be dismissed out of hand. PillPack's argument based on the costs of notice if the class is certified (*id.* at 11), fares no better because those costs would be borne by Plaintiff. Equally baseless its PillPack's assertion that class members might be confused if they receive notice of a certified class but a subsequent ruling results in them losing on the merits of one claim. No class member's claim will turn only on the ATDS definition because, as Plaintiff's evidence supports, PillPack's agents not only placed calls using an ATDS, but those calls themselves delivered prerecorded messages. Furthermore, an adverse outcome on the merits is a possibility in all class actions because class certification is not intended to be a ruling on the merits of a class's claims. Speculation about class member confusion, even if correct, does not establish any hardship or inequity to *PillPack* absent a stay.

IV. CONCLUSION

Plaintiff respectfully requests the Court deny PillPack's motion for a lengthy stay pending the Supreme Court's ruling in a case that will not be dispositive of either of the two claims in this action.

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RESPECTFULLY SUBMITTED AND DATED this 10th day of August, 2020.

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CERTIFICATE OF SERVICE

I, Blythe H. Chandler, hereby certify that on August 10, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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